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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED MINE WORKERS OF AMERICA HEALTH AND RETIREMENT FUNDS, et al., ... *Petitioners,*

v.

GRACIE ROBINSON AND JUANITA HAGER, etc., ... *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

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COUNTERSTATEMENT OF ISSUES PRESENTED

1. **Whether arbitrary and capricious employee trust provisions which violate Section 302(c)(5) of the Taft-Hartley Act can be immunized from judicial review by their inclusion in a collectively bargained agreement.**

2. **Whether this Court's holding in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass* precludes judicial review and reformation of collectively bargained trust provisions which violate Section 302 of the Taft-Hartley Act.**

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS

COUNTERSTATEMENT OF THE CASE

Respondents are the surviving dependents of coal miners who were qualified for retirement pensions by age and length of service but who continued working past minimum retirement age and died while still actively employed in the coal industry. Respondents challenged the legality of certain provisions of the UMWA 1950 Benefit Plan and Trust which grant health care benefits to the widows of coal miners with as little as one year of contributory service and which deny coverage of the

same benefits to widows of other deceased miners, some of whom had more than twenty years of contributory service. (P.A. 10a).[1]

Respondents Gracie Robinson and Juanita Hager were both denied the permanent health care coverage provided under the Trust to widows of pensioners because their husbands, although eligible to retire in terms of age and years of service, continued working past retirement age, died while still actively employed, and had not filed for retirement pensions before they had died. (J.A. 45-49).

Respondent Gracie Robinson is the widow of Floyd Robinson. When he died in 1967, pension eligibility required attainment of age fifty-five and twenty years of employment, including one year of contributory employment. (P.A. 5a, n. 12; J.A. 46). At the time of his death, Floyd Robinson was fifty-five years old, and was actively employed by a contributory employer. He had worked for more than 25 years in the coal industry. Continuously, from the inception of the Funds in 1946 until his death in 1967, Floyd Robinson worked only for coal operators that contributed royalties to the Funds. (J.A. 19). The Trustees credit Floyd Robinson with twenty more years of contributory service than they required at the time of his death for pension eligibility. (J.A. 46).

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[1]Citations in the form "P.A." refer to the Appendix to the Petition for Certiorari; those in the form "J.A." refer to the Joint Appendix.

Although Mr. Robinson was eligible to retire and to draw pension benefits from the 1950 Fund, he continued working for a contributing employer, and died without applying for his retirement pension. But for Mr. Robinson's failure to cease work and apply for a retirement pension, his widow would have been awarded permanent survivors' health benefits from the 1950 Benefit Trust. (R. 34). However, when Gracie Robinson applied for the permanent health care coverage provided by the defendant Funds to the widows of pensioners, she was denied benefits on the grounds that although Floyd Robinson had a history of contributory employment far in excess of the contributory service required for a retirement pension, he had continued working past retirement age, had died while still employed and had never filed an application for a retirement pension. (J.A. 45-49).

Juanita Hager's deceased husband, Paul Hager, entered the coal mines in 1931, when he was nineteen years old. He worked in the coal industry until March, 1968, at which time he retired, applied for, and began receiving a retirement pension from the UMWA Welfare and Retirement Fund of 1950 (1950 Fund). After briefly receiving the pension, Mr. Hager returned to work in the coal industry in October, 1968, and worked steadily until his death at age fifty-nine on March 22, 1971. (J.A. 21). All of Mr. Hager's twenty-four years of work in the coal industry after May 26, 1946, were in classified positions for contributory employers. At the time of his death, Mr. Hager exceeded all eligibility

requirements for a retirement pension from the 1950 Fund, except that he had continued working in contributory employment and had not filed a written application for retirement benefits. He had nineteen years of contributory service in excess of the five then required for pension eligibility. (JA. 20-21).

Article II, E(3) of the 1950 Benefit Trust states that permanent survivors' health benefits will be provided to the unmarried surviving spouse and dependents of a miner who died ". . . prior to the effective date of this Plan [i.e. December 6, 1974] and on or after May 29, 1946, at a time *when he was receiving* a retirement or disability pension under the eligibility rules then in effect . . ." (emphasis added) (P.A. 114a). The Trustees have interpreted this language to include the widow and dependents of miners who, although not actually "receiving" pensions at death, had ceased work and applied therefor prior to death, and were eligible in terms of age and years of service. (R. 53, Defendants' Answers to Interrogatories 4 and 5, p. 4-5). Excluded from eligibility under Article II, E(3), according to the Trustees' interpretation, are the widows and dependents of miners who were eligible for pensions in terms of age and years of service at the time of their deaths, but had not actually ceased work or applied for the pension. Thus, Respondents Gracie Robinson and Juanita Hager are excluded from coverage because their husbands continued working for contributory companies until their deaths rather than retiring at age fifty-five and applying for pensions. (J.A. 49).

Important to the resolution of the issues presented in this case is Article XX(g)(5) of the 1974 Wage Agreement which provides that:

> The Trustees are authorized, upon approval by the Employers and the Union, to make such changes in the Plans and Trusts hereunder as they may deem to be necessary or appropriate.
>
> They are also authorized and directed, after adequate notice and consultation with the Employers and Union, to make such changes in the Plans and Trusts hereunder, including any retroactive modifications or amendments, which shall be necessary:
>
> (a) to conform the terms of each Plan and Trust to the requirements of ERISA, or any other applicable federal law. . .
>
> . . . .
>
> (d) to comply with all applicable court or government decisions or rulings.

(P.A. 106a). The District Court concluded that Article XX of the 1974 Agreement provided that if an arbitrary denial is shown, the trustees are bound to reform the objectionable provisions. (P.A. 30a). Similarly, Article VIII(12) of the 1950 Benefit Trust further authorizes the Trustees ". . .to do all acts which may be necessary to comply with any of the applicable requirements of Federal Law." (1950 Benefit Plan & Trust, p. 25, R. 4).

The Trustees characterize the 1974 negotiations as if the collective bargainers had considered

specifically the Respondents' class, and that after intense negotiations concerning them, the class was excluded from coverage. Respondents must disagree with that characterization of the negotiations, for the evidence actually shows that there were no negotiations concerning Respondents' specific class.

During the negotiations the Union initially proposed permanent health care coverage for all widows regardless of whether their spouses were age and service eligible for pensions at death. The Union narrowed its proposal to three classes of widows, all of whose husbands died prior to December 6, 1974: namely, the widows of pensioners, the widows of disabled miners, and the widows of miners who were "working but eligible" for pensions at death. (R. 61, Trustees' Exhibit No. 2). Although the bargainers referred to a "working but eligible" group, "working but eligible" had a very different meaning to the bargainers, who did not specifically discuss the Respondents' class. Mr. Roger Haynes, Chairman of the BCOA Benefit Subcommittee on Benefits Negotiations and negotiator for the BCOA, (J.A. 106) testified that "working but eligible includes a miner who was eligible but no longer working". (J.A. 117). Likewise, Thomas Bethell, the Union's Research Director during the negotiations, testified that the working but eligible group which was proposed in the negotiations was broader than Respondents' class, and included miners who were not working in the coal industry at death. (J.A. 123). Accoring to Donald Pierce, who participated in the negotiations for the Union, the Respondents'

class was not specifically considered. He testified that in the negotiations "[t]he word, 'working' here was a loose word," and apparently it included widows of pension eligible men who were not actually working in the coal industry. (J.A. 102).

Contrary to the District Court's statement, in its June, 1978, opinion that "[t]he Union agreed to forego its demand for permanent health care of plaintiffs in return for other benefits for working miners," (P.A. 18a), Mr. Pierce testified that there was no such trade-off. (J.A. 95). Importantly, Mr. Haynes testified that they did not consider the fact that deceased husbands of the Respondents' class of widows in fact had kept working after age fifty-five, and in fact some had kept working with contributory employers, and that that was why they had not applied for retirement pensions. (Transcript p. 77, J.A. 119). Mr. Haynes also testified that the basis of the bargainers' uncertainty about the size of the "working but eligible" group was that more pensioners than expected had been added by the *Blankenship* settlement.[2] (J.A. 117). The Union projected the size of the "working but eligible" group of widows at not more than 4,000 persons or not more than 10% of the "widows of pensioners" group (J.A. 79-81). Except for the general concern about a nebulous "woodwork" population, the Union's estimate was not refuted by the employers. (J.A. 128). According to the testimony presented by the trustees, the negotiators:

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[2]Referring to the settlement entered as a result of *Blankenship* v. *Boyle*, 329 F. Supp. 1089 (D.D.C. 1971).

> . . . looked at this class as maybe adding a small additional amount of money to the total cost of benefits for widows and in itself not a large number . . . Similarly with respect to this particular group especially, neither side argued the case so much on the merits of the exact size of the class.

(J.A. 81-82).

In the course of the negotiations agreement was unexpectedly reached on a separate issue -- the per tonnage royalty figure. The accord reached on that separate issue in effect terminated the bargaining process, and the negotiations concerning widows' health care coverage ceased. By the time the main table negotiators reached the accord on the per tonnage royalty, the benefits negotiators had already reached tentative agreement on coverage for the widows of disabled miners and for the widows of men who were receiving pensions at the time of their deaths. No agreement had been reached on the eligibility of widows of men who were not pensioners. (J.A. 92-95, 115-116, 128-130). With the Unions' acceptance of the employers' per tonnage royalty figure, bargaining over health care coverage ceased "in order to peg employer contributions at a mutually agreeable level." *Robinson* v. *UMWA Health and Retirement Funds*, 640 F.2d 416, 423, (D.C. Cir. 1981). (P.A. 13a; see J.A. 85, 87, 94-95, 115-116).

SUMMARY OF ARGUMENT

The Court of Appeals correctly ruled that Article II E of the U.M.W.A. Benefit Plan and Trust violates L.M.R.A. Section 302. The exclusion of Respondents' class was arbitrary and capricious and cannot be excused merely by showing that the trust provisions had been the subject of collective bargaining. It is well settled that Section 302 imposes substantive limitations on the nature of employee trust eligibility provisions. Because of the Congressional intent that eligibility for benefits be tied to contributory work, provisions which deny benefits to those persons with significant contributory work histories and yet give benefits to other persons with substantially shorter contributory work histories are particularly suspect. If such a discrepancy is shown, the trustees must show some rational nexus between the funds' purpose and the provision. Benefits are denied to Respondent-widows by a requirement which gives benefits to persons whose spouses had worked substantially lesser periods of time for contributory employers.

The Trustees could show no rational basis between the Fund's purpose and the requirement. The Trustees argued that there was a rational nexus because the provision resulted from collective bargaining. Collective bargaining is not a defense under Section 302 to arbitrary and capricious provisions. The legislative intent proves that the mere fact that a provision was collectively bargained does not cause the arbitrary provision to meet

Section 302's requirement that the eligibility provisions not be arbitrary and capricious.

The Trustees also argue that the trust provision is immune from judicial review because it had been collectively bargained. That argument was not accepted by either the District Court or the Court of Appeals, and has no basis in the law. As explained above, the Court of Appeals correctly concluded that the exclusionary provision violated Section 302. It is well settled that collectively bargained agreements may be reformed if they violate federal law or public policy. The protection afforded retirees and survivors by Section 302 is analogous to the protection afforded active employees by the duty of fair representation. Both Section 302 and the duty of fair representation offer protection from arbitrary action, and neither interfere with the federal policy of encouraging collective bargaining.

There is no factual or legal basis for the Trustees' argument that the decision below conflicts with Section 8(b)(3) of the N.L.R.A., or with this Court's holding in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 157 (1971). The collective bargainers had freely undertaken to negotiate health benefits for existing retirees and survivors. They were under no compulsion to do so. But when they undertook to provide for the transfer of funds to a union-management fund they created a public trust under Section 302. The trust is a creature of federal law and must comply with the requirements of Section 302 and the federal common law developed thereunder for carrying out the

policies of Section 302's enactment. In the present case, no collective bargaining party will be forced to bargain to impasse and this case does not involve any conflict between N.L.R.A. Section 8(b)(3) and L.M.R.A. Section 302.

The argument of the AFL-CIO, that the decision is contrary to the common law of trusts is erroneous. The AFL-CIO ignores the differences between ordinary private trusts and Section 302 employee benefit trusts. Section 302 employee benefit trusts are public trusts which are creatures of federal statute, and which must comply with requirements of federal law.

The other argument of the amicus AFL-CIO that the Court of Appeals' decision is not supported by ERISA is also erroneous. ERISA was enacted at a time when collective bargaining of employee trust provisions had become rather commonplace, and yet Congress, rather than diluting the grounds for judicial intervention, instead codified and reinforced the remedial and fiduciary aspects developed under Section 302.

Section 302 employee benefit trusts are irrevocable and are subject to reformation if it is shown that a provision, such as the one in issue in this case, violates the requirements of Section 302.

ARGUMENT

I.

Article II E of the U.M.W.A. 1950 Benefit Plan and Trust violates L.M.R.A. Section 302.

The Court of Appeals determined that the provision at bar excludes from coverage the survivors of miners with substantial histories of contributory employment, while conferring that coverage upon survivors of miners with appreciably less contributory employment, and that no proof was presented that the provision was rationally related to the Fund's purposes. (P.A. 10a-11a). Having concluded that the exclusion of Respondent's class was arbitrary and capricious and in violation of Section 302(c), the Court of Appeals held that the exclusion was not excused merely because it was the product of collective bargainers. (P.A. 12a).

The Trustees argue that the Court of Appeals applied a "reasonableness" standard that is not supported by Section 302. According to the Trustees, Section 302 imposes no substantive legal requirements other than the requirement that the trust be in a written agreement and that benefits not be paid to non-employees. (Trustees Brief, p. 27). The Trustees thus argue that so long as the beneficiaries are employees the terms of the trust may be arbitrary and capricious without limit and are immune from judicial scrutiny. Respondents contend that the arbitrary provision here in issue is unlawful, and that it is subject to scrutiny. Because the Trustees' argument is based on their contention that Section 302 does not impose substantive

requirements which a Taft-Hartley trust must meet in order to conform to Section 302, the Respondents will first address this contention.

A. Section 302 imposes a legal prohibition against arbitrary and capricious eligibility provisions which have no rational nexus to the Fund's purposes.

According to the decision of the Court of Appeals:

> Section 302(c), we repeat, requires trust funds to be held "for the sole and exclusive benefit of the employees of [the contributing] employer." Any rule denying benefits to miners on whose behalf significant contributions to a pension fund have been made appears on its face to contravene this statutory command, and thus calls for satisfactory explanation. This is particularly true if, at the same time, the rule grants benefits to others who have worked a considerably lesser period of time for contributing employers. In all such circumstances, we have insisted that the trustees demonstrate some "rational nexus between the Fund's purpose and the [eligibility] requirement."

Robinson v. *UMWA Health and Retirement Funds*, 640 F.2d 416, 421 (1981), (P.A. 8a-9a). The decision of the Court of Appeals is totally in accord with the mandate of Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. §186(c)(5), (hereinafter LMRA) which requires that the employee trust funds be maintained "for the sole

and exclusive benefit" of the employees of the contributing employer and their families and dependents. 29 U.S.C. §186(c) (1976).

The majority of federal courts have held that judicial review exists over claims that a Section 302 trust contains a "structural" defect which is violative of Section 302's "sole and exclusive benefit" requirement. E.g., D. Preminger and C. Clancy, *Aspects of Federal Jurisdiction Under Sections 302(c)(5) and 302 (e) of the Taft-Hartley Act.* 4 TEXAS SOUTHERN LAW REVIEW 1 (1976); *Music* v. *Western Conference of Teamsters,* 660 F.2d 400 (9th Cir. 1981); *Insley* v. *Joyce,* 330 F.Supp. 1228 (N.D. Ill. 1971). Any case involving "exclusionary eligibility requirements of a trust fund places in issue the question whether the fund is a Section 302 trust fund." *Lugo* v. *Employees Retirement Fund,* 366 F.Supp. 99, 102 (E.D. N.Y. 1973), *aff'd* 529 F.2d 251 (2d Cir. 1976). If the plan arbitrarily and capriciously excludes persons from benefits, it ceases to be a valid plan within the meaning of Section 302. See e.g., *Roark* v. *Lewis,* 401 F.2d 425 (D.C. Cir. 1968).

It is well settled that the Congressional decision to "explicity cast authority to create such . . . fund[s] in trust terms," *Roark* v. *Lewis,* 401 F.2d 425, 426 (D.C. Cir. 1968) established the "fiduciary character of the responsibilities devolved upon the

trustees in respect of [covered] employees." *Kosty* v. *Lewis*, 319 F.2d 744, 748 (D.C. Cir. 1963), *cert. denied* 375 U.S. 964 (1964). Trustees of jointly administered funds are thereby "subject to judicial correction in a proper case upon a showing that they have acted arbitrarily or capriciously towards. . . persons to whom their trust obligations run." *Kosty* v. *Lewis*, 319 F.2d 744, 747 (D.C. Cir. 1963) *cert. denied* 375 U.S. 964 (1963); *Argo* v. *Joint Plumbing Industry Board*, 623 F.2d 207 (2d Cir. 1980); *Valle* v. *Joint Plumbing Industry Board*, 623 F.2d 196 (2d Cir. 1980); *Music* v. *Western Conference of Teamsters*, 660 F.2d 400 (9th Cir. 1981); *Johnson* v. *Botica*, 537 F.2d 930, 935 (7th Cir. 1976); *Lee* v. *Nesbitt*, 453 F.2d 1309, 1311 (9th Cir. 1971); *Pete* v. *UMW Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1283 (D.C. Cir. 1975); *Roark* v. *Boyle*, 439 F.2d 497, 499 (D.C. Cir. 1970); *Gaydosh* v. *Lewis*, 410 F.2d 262, 265 (D.C. Cir. 1969); *Roark* v. *Lewis*, 401 F.2d 425, 427 (D.C. Cir. 1968); *Danti* v. *Lewis*, 312 F.2d 345, 348 & n. 3 (D.C. Cir. 1962).

The Court's power in these cases arises from the mandate of Section 302(c)(5) that the trusts be for the "sole and exclusive benefit" of the employees, and from Section 302(e), which provides that the federal district courts shall have jurisdiction to restrain violations of the act. 29 U.S.C. §186(c)(5); 29 U.S.C. §186(e); 93 Cong. Rec. Part 4, 80th Cong. 1st Sess. 4746 (1947). In *Lugo* v. *Employees Retirement Fund, et al.*, 366 F. Supp. 99 (E.D. N.Y. 1973), the court assumed jurisdiction by stating:

> [W]e do not do so under any broad chancery powers. . . . or under the theory that Section 302(e) is the 'foundation stone for federal court management of trust funds' . . . Rather, we believe that jurisdiction in a case of this kind can be found within the 'penumbra of express statutory mandate' of Section 302.

Lugo, supra, at 103.

The "penumbra of express statutory mandate" was explained recently in *Complete Auto Transit* v. *Reis,* _____ U.S. _____, 101 S.Ct. 1836, 1839 (1981), quoting from *Textile Workers Union of America* v. *Lincoln Mills of Alabama,* 353 U.S. 448, 457 (1957), where this Court in discussing Section 301, stated:

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem.

Complete Auto Transit v. *Reis, supra,* 101 S.Ct. 1836, 1839 (1981).

During the more than thirty years since its passage, the policy of Section 302 has guided the courts in deciding a number of cases involving allegations that the employee trusts were for some reason not for the "sole and exclusive benefit" of the employees. Where such allegations are presented, the

courts have jurisdiction to determine if the purposes of Section 302 are met, and if they are not met, to restrain the violation by directing trustees' acts or ordering the reformation of objectionable plan requirements. See e.g., *Bowers* v. *Uipiano Casal, Inc.*, 393 F.2d 421 (1st Cir. 1968); *Insley* v. *Joyce*, 330 F.Supp. 1228 (N.D. Ill. 1971); *Burroughs* v. *Board of Trustees of Pension Trust Fund for Operating Engineers*, 542 F.2d 1128 (9th Cir. 1976); *Knauss* v. *Gorman*, 583 F.2d 82, 86 (3rd Cir. 1978); *Norton* v. *I.A.M. Nat. Pension Fund*, 553 F.2d 1352, (D.C. Cir. 1977); *Bueneman* v. *Central States, Southeast and Southwest Areas Pension Fund*, 572 F.2d 1208 (8th Cir. 1978); *Mestas* v. *Huge*, 585 F.2d 450 (10th Cir. 1978); *Rueda* v. *Seafarers International Union*, 576 F.2d 939 (1st Cir. 1978); *Sailer* v. *Retirement Fund Trust of Plumbing, Heating, and Piping Industry*, 599 F.2d 913 (9th Cir. 1979). Thus, federal appellate courts have reformed Section 302 trust provisions such as those that provided benefits only to miners whose last year of employment was with a contributory employer, regardless of whether or not the worker had other years of contributory service, *Pete* v. *UMWA Welfare & Retirement Fund of 1950*, 517 F.2d 1275 (D.C. Cir. *en banc* 1975); *Roark* v. *Lewis*, 401 F.2d 425 (D.C. Cir. 1968); *Roark* v. *Boyle*, 439 F.2d 497 (D.C. Cir. 1970); and those that impermissibly denied credit for years worked before a break in service, *Lee* v. *Nesbitt*, 453 F.2d 1309 (9th Cir. 1971).

The first court to supply significant "judicial correction" of arbitrary trustee action was the

District of Columbia Circuit, which resolved a number of disputes involving the United Mine Workers Welfare and Retirement Fund during the 1960's and early 1970's. See e.g., *Kosty* v. *Lewis*, 319 F.2d 744 (D.C. Cir. 1963); *Roark* v. *Boyle*, 439 F.2d 497 (D.C. Cir. 1970); *Lavella* v. *Boyle*, 444 F.2d 910 (D.C. Cir. 1971); *Danti* v. *Lewis*, 312 F.2d 345 (D.C. Cir. 1962); *Miniard* v. *Lewis*, 387 F.2d 864 (D.C. Cir. 1967). In one of the first of these cases, *Roark* v. *Lewis, supra*, the Court of Appeals made clear that the "arbitrary and capricious" standard of judicial review was as applicable to the adoption and enforcement of eligibility conditions for trust benefits as to any other trustee action:

> . . .[W]e see no reason why the previously announced standard (to determine whether the trustees' conduct was arbitrary and capricious) should not apply. Trustees' action in prescribing eligibility requirements affects the rights of potential beneficiaries in the same vital way as do other trustees' action.

Roark v. *Lewis*, 401 F.2d 425, 427 (D.C. Cir. 1968).

The Court in *Roark* v. *Lewis* then defined the cluster of purposes for which a Taft-Hartley pension trust is formed as the point of reference for determining whether particular eligibility conditions were arbitrary and capricious. Eligibility conditions were required to "promote" rather than undermine these purposes. If particular eligibility requirements were shown to operate harshly or unfairly, the burden shifted to the trustees to demonstrate "the reasonableness of their requirement(s) based on the purposes of the fund." *Roark* v. *Lewis*, 401 F.2d

425, 428 (D.C. Cir. 1968). The wisdom of this standard of review was that the judicial "correction" of the eligibility restrictions was determined in light of the fundamental goals for which jointly administered pension trusts are permitted to be created. The beneficiaries were thereby protected from arbitrary action that could not be justified in terms of these legislative goals. Thus, when a court found particular eligibility conditions to be arbitrary and capricious, its holding was grounded not in its own conception of the purposes of a trust fund, but rather in the trust fund's statutorily shaped objectives. *Roark* v. *Lewis, supra,* 401 F.2d at 427-429.

The *Roark* decision is especially relevant to the issue at hand, for at issue in *Roark* was an eligibility standard which, like the provision at issue in this case, operated to exclude from coverage persons with substantial histories of contributory service and yet granted benefits to many persons with appreciably smaller histories of contributory service. Under the eligibility requirement at issue in *Roark:*

> "employees could spend . . . practically their entire adult lives working for mine owners who had contributed to the Fund since its inception; yet if they were to work for a non-signatory operator for any period after leaving a signatory operator, they would forfeit their otherwise valid pension claims." In sharp contrast, other miners could have worked 19 years for a non-contributing employer and yet gain eligibility by only a year of signatory work.

Robinson v. *UMWA Health & Retirement Funds,* 640 F.2d 416, 421, 33 (D.C. Cir. 1981) quoting from *Roark* v. *Lewis,* 401 F.2d 425, 428 (D.C. Cir. 1968).

Significantly, in *Roark* v. *Boyle* the court ruled that Section 302(c)(5) and the arbitrary and capricious analysis are predicated on the concept that eligibility for retirement benefits must be closely tied to contributory employment.

> [I]n enacting the statute [Section 302] "Congress obviously contemplated payments to union welfare funds would be made by employers for the benefit of their employees" and that "a key purpose" of payment to the fund was to assist "the employees of contributing employers."

Pete v. *UMWA Welfare and Retirement Fund of 1950,* 517 F.2d 1275, 1284 (D.C. Cir. *en banc* 1975) quoting from *Roark* v. *Boyle,* 439 F.2d 497, 499 (D.C. Cir. 1969). See also, *Fase* v. *Seafarers Welfare and Pension Plan,* 432 F.Supp. 1037 (E.D. N.Y. 1977).

In fact, courts have consistently found that a primary purpose of the Petitioner UMWA Health and Retirement Funds is to benefit miners and the survivors and dependents of miners with significant contributory work histories. *Pete* v. *UMWA Welfare and Retirement Funds of 1950, supra* at 1283; *Roark* v. *Lewis, supra; DePaoli* v. *Boyle,* 447 F.2d 334 (D.C. Cir. 1971); *Teston* v. *Carey,* 464 F.2d 765 (D.C. Cir. 1972).

In *Roark* v. *Lewis* the Court found that when:

> . . .employees are *denied* pensions by a requirement which would *give* pensions to employees having worked a substantially lesser period of time for contributing employers, the burden is on the trustees to show some rational nexus between the Fund's purpose and the requirement.

Supra, at 429. (Emphasis original).

B. The exclusion of Respondent-widows was arbitrary and capricious.

The permanent health care eligibility provision at bar has the same exclusionary effect regarding employees with substantial contributory work histories and their families which concerned the *Roark* court. Respondent-widows, whose husbands were loyal contributory employees with massive contributory work histories (twenty-one years by Floyd Robinson and twenty-four years by Paul Hager), are excluded from health coverage; while the survivors of miners with as little as one year of contributory employment are eligible for and receiving lifelong health coverage. (R. 1, R. 35).[3] As the Court of Appeals noted, the provisions "reward those persons who retire early and for whom no

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[3]The Trustees have in effect conceded that the provision is arbitrary by failing to raise that issue in the petition for certiorari. Trustees are limited to the issues presented in their petition for certiorari. *California* v. *Taylor*, 353 U.S. 553, 556, n. 2 (1957); *Neely* v. *Eby Construction Co.*, 386 U.S. 317, 330 (1967).

further contributions are made into the health benefit fund." *Robinson* v. *UMWA Health & Retirement Funds*, 640 F.2d 416, 422 (D.C. Cir. 1981) (P.A. 11a).

It is incongruous that the 1950 Benefit Trust, the purpose of which is to reward contributory service, rewards those whose husbands retired early and drew retirement pensions out of the funds and yet denies coverage to the Respondent-widows whose husbands, although eligible to retire, kept working past retirement age in contributory employment. The Trustees could show no justification for this exclusion which in effect penalized these skilled workers for remaining in contributory service. For instance, the Trustees could not show that they could not afford to grant the permanent health care coverage to the Respondents. If that were suggested as a defense, it would be erroneous as a matter of law, for any genuine fiscal problem must be spread equitably among all trust beneficiaries, and even a genuine fiscal problem cannot be alleviated by the arbitrary exclusion from coverage of an otherwise deserving class of beneficiaries.[4] *Pete* v. *UMWA*

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[4]It is axiomatic that any group's exclusion from benefits will further the fiscal integrity of any fund, and that "financial considerations by themselves should not be sufficient justification for an exclusive eligibility requirement as *every* eligibility requirement would have the virtue of saving money." *Fase* v. *Seafarers Welfare & Pension Plan*, 432 F.Supp. 1038, 1041 (E.D. N.Y. 1977) *aff'd*, 589 F.2d 112 (2d Cir 1978). Clearly, a trust provision which rewards those who retire early and draw the most retirement benefits from the fund and yet denies benefits to

(continued on page 23)

Welfare and Retirement Fund of 1950, supra. Winpisinger v. *Aurora Corp. of Illinois*, 456 F.Supp. 559 (N.D. Ohio 1978). The Trustees could only show that the industry negotiators' goal was to contain the cost of benefits. Thus, Circuit Judge Robinson correctly held that although fiscal soundness may be a legitimate concern, "financial integrity must be secured by methods dividing beneficiaries from nonbeneficiaries on lines reasonably calculated to further the fund's purposes." *Robinson, supra*, 640 F.2d at 424; (P.A. 14a)[5]

(footnote 4, continued from page 22)

those who continued to work in contributory employment does not enhance the fiscal soundness of the trust. Additionally, administrative convenience was not offered as a justification as that consideration is not a factor under the facts at hand. The Trustees apparently had no difficulty in determining Mr. Robinson's or Mr. Hager's pension eligibility as of the time of their deaths, even without their written applications having been filed. Because the burden of proving pension eligibility will fall upon the widow, not upon the Trustees, administrative convenience does not support the requirement.

[5]Although Judge Robb, in his dissent, suggested that the death benefit differential could be a justification for the arbitrary exclusion of respondent-widows, (*Robinson* v. *UMWA Health and Retirement Funds*, 640 F.2d 416, 426 (D.C. Cir. 1981)), (P.A. 19a), the death benefit provisions and the health coverage provisions actually are separate programs which were intended to serve separate needs. The widows of pensioners who died prior to December 6, 1974, received from the 1950 Fund $2,500 in death benefits, with permanent health coverage, while certain widows of active miners who actively employed with a contributory company at death received $5,000 in death benefits and five years of health coverage. (Boylan Affidavit, P.A. 73a). Eligibility for the death benefit provided to survivors of active miners was not dependent on pension eligibility or age, instead, that coverage is available regardless of the time that the miner had worked for the

(continued on page 24)

It was therefore within the framework of the well-established case law that the respondent-widows established that their exclusion from permanent health care coverage was arbitrary and capricious. *Norton* v. *I.A.M. National Pension Fund*, 553 F.2d 1352 (D.C. Cir. 1977); *Lavella* v. *Boyle*, 444 F.2d 910 (D.C. Cir. 1971); *Teston* v. *Carey*, 464 F.2d 765 (D.C. Cir. 1972); *Music* v. *Western Conference of Teamsters*, 660 F.2d 400 (9th Cir. 1981); *Burroughs* v. *Board of Trustees*, 398 F.Supp. 168 (N.D. Cal. 1975), *aff'd*, 542 F.2d 1128 (9th Cir.), *cert. denied*, 429 U.S. 1096.

C. Section 302 is not satisfied by a mere showing that an arbitrary and capricious employee trust provision was collectively bargained.

The District Court held, after Respondents had shown that the provision was arbitrary, that the burden shifted to the Trustees to justify the provision. After hearing evidence, the District Court then concluded that the challenged provision was the result of good faith collective bargaining, and

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(footnote 5, continued from page 23)

employer. (Resolution 68, P.A. 82a-85a). The same death benefit differential was in effect for several years prior to the inception of the permanent survivors' health coverage provisions. Additionally, a substantial number of the members of respondents' class in all likelihood did not receive any death benefit, let alone the higher $5,000 figure. These would include the widows of pension eligible miners who were not employed by a contributory employer at the time of their death. (Compare Resolution 68, Eligibility, P.A. 83a, and Order certifying class, J.A. 41-42).

granted the Trustees' motion for summary judgment. *Robinson, supra,* 640 F.2d at 426 (P.A. 182-192).

Respondent-widows contend, as the Court of Appeals held, that good-faith collective bargaining cannot be a justification for their arbitrary exclusion from health care coverage.[6] The good faith of collective bargainers in establishing eligibility provisions does not insure that the fund is administered for the "sole and exclusive benefit of employees of contributory employers," or that the eligibility requirements meet the "rational nexus" test which is required by Section 302(c)(5). *Norton* v. *I.A.M. National Pension Fund,* 553 F.2d 1352 (D.C. Cir. 1977).

The Trustees' argument that Section 302 was not intended to control the content of collectively bargained trust provisions is in error because the language in Section 302 explicitly controls the content of collective bargaining agreements. The very language of Section 302(c) requires that "the detailed basis on which [benefit] payments are to be made [be] specified in a written agreement with the employer." 29 U.S.C. §186(c)(5)(B) (1976). That written agreement is almost certain to be the result of collective bargaining, *Moglia* v. *Geoghegan,* 267

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[6]Respondent-widows further contend that if good-faith collective bargaining were a justification for the arbitrary exclusion, summary judgment still could not be granted for the Trustees because there still exists a genuine issue of fact as to whether the parties bargained in good faith respecting the exclusion of Respondents' class. *United States* v. *Diebold, Inc.,* 396 U.S. 654 (1962); Rule 56, F.R.C.P.

F.Supp. 641, 646 (S.D. N.Y. 1967), *aff'd*, 403 F.2d 110 (2d Cir. 1968), *cert. denied.*, 394 U.S. 919 (1969). "The Taft-Hartley Act presumed that management and labor would agree on pension eligibility requirements." *Pete* v. *UMWA Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1286 (D.C. Cir. 1975). Additionally, Section 302 was specifically designed to control abuses in the collective bargaining process and "to protect employees from the collusion of union officials and management." *Mosley* v. *National Maritime Union Pension & Welfare Plan*, 438 F.Supp. 413, 421 (E.D. N.Y. 1977); *Arroyo* v. *United States*, 359 U.S. 419, 424-427 (1959). As District Judge Gesell pointed out in *Blankenship* v. *Boyle*, 329 F.Supp. 1089, 1094 (D.D.C. 1971), "the statute under which the 1950 Fund is organized [Section 302] was designed expressly to isolate such welfare funds from labor-management politics."

The Congressional design that collective bargaining cannot justify what otherwise would be a violation of Section 302 can be seen by looking at Section 302(c)(4) of the LMRA, 29 U.S.C. §186(c)(4).[7]

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[7] "[E]very part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." *Mastro Plastic Corp.* v. *NLRB*, 350 U.S. 270, 298 (Frankfurter dissenting) (1956) quoting *Market Co.* v. *Hoffman*, 101 U.S. 112, 115-116 (1879).

Section 302(c)(4) provides that union dues may be deducted from wages only if the employer has obtained a written assignment from the employee irrevocable for no longer than one year. That part of Section 302 is a restriction on the right of collective bargainers, and shows that Congress intended the content of collective bargaining agreements to be subordinated to Section 302; not that Section 302 be subordinated to the content of collective bargaining agreements. *International Longshoremen's Asso.* v. *Seatrain Lines, Inc.*, 326 F.2d 916 (2d Cir. 1964).

Recently, in a case involving the issue of whether a Section 302 trustee was a bargaining representative under the NLRA, the Supreme Court had occasion to review the legislative history of Section 302(c)(5):

> . . . [T]he legislative history of the LMRA confirms that § 302(c)(5) was designed to reinforce, not alter, the long established duties of a trustee.
>
> . . . .Senator Ball stated that "all we seek to do by [§ 302(c)(5)] is to make sure that the employees whose labor builds this fund and are really entitled to benefits under it shall receive the benefits; that it is a trust fund, and that if necessary, they can go into court and obtain the benefits to which they are entitled." 93 Cong. Rec. 4753, 2 Leg. Hist. LMRA, at 1322; see H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., at 66-67, 1 Leg. Hist. LMRA, at 570 . . . . Senator Taft, the primary author of the entire Act, answered that

> many existing funds were not created expressly as trusts, and that § 302(c)(5)'s requirement that each fund be an express and enforceable trust would ensure that the future operations of all such funds would be subject to supervision by a court of chancery. 93 Cong. Rec. 4886, 2 Leg. Hist. LMRA, at 1322. (Emphasis added).

N.L.R.B. v. *Amax Coal Co.*, _____ U.S. _____, 101 S.Ct. 2789 (1981).

Clearly, that legislative intent that employee trust funds be subject to equitable correction would be thwarted if arbitrary provisions could be justified merely by showing that they were collectively bargained.

The very trustees who are the petitioners in the case at bar filed an amicus curiae brief in the *NLRB* v. *Amax Coal Corp.*, _____ U.S. _____, 101 S.Ct. 2789 (1981), in which they argued to this Court that "the courts have consistently found that such trustees have an independent and overriding fiduciary duty to act solely in the interest of the beneficiaries of the trust funds they administer." (Amicus Brief of Board of Trustees of the United Mine Workers of America Health and Retirement Funds, in N.L.R.B. v. Amax Coal Company, Supreme Court Consolidated Case Nos. 80-289 and 80-862, p. 19). As Trustee-petitioners in the present case argued to this Court in *Amax:*

> Other courts have similarly delimited the scope of trustee representation under Section 302

> (c)(5) of the LMRA. As "representatives," trustees may consider and, in their discretion, adopt recommendations of the collective bargaining parties "pertinent to effective administration of the [f]und." *Toensing* v. *Brown*, 528 F.2d 69, 72 (9th Cir. 1972). Trustees may not, however, be bound by those recommendations. *Toensing* v. *Brown*, *supra*, 528 F.2d at 72; *Lamb* v. *Carey*, 498 F.2d 789, 794 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 869 (1974); see *Miniard* v. *Lewis*, *supra*, 387 F.2d at 865, n.5; *United Marine Division I. L.A., Local 333, A.F. of L.* v. *Essex Transportation Co.*, *supra*, 216 F.2d at 412. That is because trustees as fiduciaries, are required to exercise independent judgment in administering trust funds established under Section 302(c)(5). They must act, in all instances, solely in the interest of the beneficiaries of the funds. Id.

(Amicus Brief of Board of Trustees of U.M.W.A. Health and Retirement Funds in N.L.R.B. v. Amax, Supreme Court Consolidated Case Nos. 80-289 and 80-692, p. 10.)

It is ironic that after arguing to this Court in *N.L.R.B.* v. *Amax Coal Corp.* that Section 302 trustees are fiduciaries who must exercise their duties independently of the collective bargainers, the Trustees now argue that the mere inclusion of eligibility provisions in a collectively bargained agreement can relieve them of those fiduciary duties. As noted by the district court below "this substantially misconceives the functions and

obligations of the trustees, who represent the interests of the beneficiaries, not the settlors." *Robinson* v. *UMWA Health & Retirement Funds*, 449 F.Supp. 941 (D.D.C. 1978).

The record in the case at hand shows the danger of allowing collective bargaining to be a defense to Section 302. The negotiators aggressively represented their principals without any sense of obligation or responsibility to the beneficiaries of the employee benefit trusts involved.[8] The Respondent-widows, posing no political threat to either side, were afforded no protection or consideration and became the victims of a frantic rush to finalize negotiations. (J.A. 66-134).

As the Court of Appeals correctly noted below:

> Were we to find rationality in every rule arising from "explicit, informed, and intense" bargaining, we would establish a sure means of circumventing statutory restrictions on the entire front of employee trust funds.

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[8]The Union's priorities in the negotiations predictably reflected the relative political power of groups within the Union membership without regard to the equities or needs of the beneficiary groups. Benefits for active miners, who were able to vote on contract ratification, took priority over benefits for retirees, who had no ratification vote. For example, one Union Memorandum, discussing permanent health coverage for "*future widows*" (i. e., widows of then active miners who would be covered by the 1974 Benefit Trust) provided that "(the) UMWA sees no compromise possible here, views this as potentially dangerous post-ratification issue especially in W. Va." (R. 61). The testimony of Donald Pierce indicates that the Union's position on this issue was largely a recognition of the importance of this issue to active, voting Union members to whom the Union leadership was ultimately accountable. (J.A. 97-98).

Robinson v. *UMWA Health & Retirement Funds*, 640 F.2d 416, 423 (D.C. Cir. 1981); (P.A. 132).

II.

Federal labor law does not immunize unlawful trust provisions from judicial scrutiny.

The Trustees argue that because the collectively bargained agreement was the result of explicit, informed and intense bargaining "[t]he Court should have declined to review the agreement of the Union and Industry to exclude Respondent's class from life-time health coverage." (Trustees' Brief, page 19-20). Although it is understandable that the Trustees and the collective bargainers wish this Court to cloak them with immunity from Section 302, to do so would leave millions of workers and their families totally unprotected from being arbitrarily excluded from employee trust benefits. The Trustees' position in this case, if accepted, would mean that arbitrary exclusions created by the delegated acts of the collective bargainers' agents would be subject to judicial scrutiny, but arbitrary exclusions created by the collective bargainers directly would be immune from judicial scrutiny. The Trustees' position is not supported by either Section 302 or by the cases they cite concerning collective bargaining. Neither the District Court nor the Court of Appeals below accepted that argument. *Robinson* v. *UMWA Health and Retirement Funds*, 449 F.Supp. 941 (D.D.C. 1978); *Robinson* v. *UMWA Health and Retirement Funds*, 640 F.2d 416 (D.C. Cir. 1981).

It is a fundamental premise of federal labor law that collectively bargained agreements may be judicially reviewed and reformed if they violate federal law or public policy. E.g., *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952); *Steele* v. *Louisville and Nashville R.R. Co.*, 323 U.S. 192 (1944); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17 (1954); *N.L.R.B.* v. *Magnavox Co.*, 415 U.S. 322 (1974); *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974). By finding the collectively bargained trust provision to be illegal under Section 302, the decisions below [redacted] *is* totally in accord with those prior decisions of this Court which have held collectively bargained agreements subject to judicial review for legality.

Of course, violations of labor rights and disputes between labor and management are generally within the jurisdiction of the N.L.R.B. An employee who has a claim against his employer or his union has internal grievance procedures and N.L.R.B. remedies as well as judicial remedies, e.g., *Clayton* v. *International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America*, 451 U.S. _____, 68 L.Ed. 2d 538, 101 S.Ct. 2088 (1981); *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); while retirees and their dependents who are not members of the bargaining unit and have no voice in the ratification of contracts are without those remedies. Unlike employees who are represented in the

bargaining process, under the N.L.R.A. no duty of fair representation is owed retirees or survivors. N.L.R.A. Section 2(3), 29 U.S.C. §152(3); *Allied Chemical & Alkali Workers* v. *Pittsburg Plate Glass*, 404 U.S. 157 (1971).

Although the bargaining process and the duty of fair representation afford the Respondents no protection, the protections afforded by the duty of fair representation are similar to the protection which is afforded the Respondents by Section 302.

The duty of fair representation works to prohibit the negotiation of arbitrary distinctions between active employees, *Vaca* v. *Sipes*, 386 U.S. 171, 190-191 (1967); *Brotherhood of Railway Trainmen* v. *Howard*, 343 U.S. 768 (1952) in the same manner that Section 302 works to prohibit the promulgation of arbitrary distinctions between the intended beneficiaries of the trusts. *Roark* v. *Lewis*, 401 F.2d 425 (D.C. Cir. 1968).

Both the bargaining representative and the trustee are accorded a wide range of reasonableness. Distinctions drawn by bargaining representatives are tolerated if the bargaining representatives can show a valid justification for the distinction, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953), in the same manner that an exclusionary benefit provision can be justified by a showing that the provision bears a rational nexus to a valid purpose of Section 302 trusts. *Norton* v. *I.A.M. National Pension Fund*, 553 F.2d 1352 (D.C. Cir. 1977). Contrary to the Trustees' arguments, the judicial review provided by

Section 302, like the judicial review provided by the duty of fair representation, is consistent with the fundamental purposes of the federal labor laws to promote orderly, fair, and peaceful labor relations.

As shown above, for the Respondent-widows and the class they represent, the only protection against arbitrary and capricious exclusionary provisions is judicial review to determine whether the exclusionary provisions meet the arbitrary and capricious standard mandated by the sole and exclusive benefit requirement of Section 302. If this court were to adopt the Trustees' view, collective bargainers could arbitrarily exclude retirees and survivors with impunity; no judicial review would apply. The legislative history of both Section 302 and ERISA reflect the strong public policy that the inclusion of exclusionary eligibility provisions in collectively bargained agreements does not insulate those eligibility provisions from judicial review to determine if they are arbitrary and capricious. H.R. Rep. No. 93-533, 93d Cong. 2d Sess. (1974), 1974 U.S. Cong. Admin. News 4650-4651; N.L.R.B. v. Amax Coal Corp., _____ U.S. _____, 101 S.Ct. 2789 (1981). As the court below observed:

> [T]he history of employee trusts warns that neither labor nor management can be counted on invariably to represent fully and fairly the employees' interests therein. Blind deference is thus unsafe in reviewing the §302(c) claims.

Robinson v. *U.M.W.A. Health Retirement Funds*, 640 F.2d at 423, n.52 (D.C. Cir. 1981); (P.A. p. 13a).

III.

The decision below does not require collective bargainers to bargain to impasse on non-mandatory subjects of collective bargaining and is not contrary to *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass.*

There is no factual or legal basis for the Trustees' argument that the decision below conflicts with Section 8(b)(3) of the N.L.R.A. The Court of Appeals did not rule that Section 302 requires collective bargainers to bargain to impasse on behalf of persons who are not members of the bargaining unit. The decision imposes no duty upon the collective bargainers to bargain.

The issue before the court was whether certain provisions of the 1950 Benefit Trust violated the substantive demands of Section 302. The collective bargainers have not been parties in this case; instead, it is the Trustees who now raise an issue which was never raised by the collective bargainers themselves.

The collective bargainers had freely undertaken to negotiate health benefits for existing retirees and survivors. They were under no compulsion to do so. But when they undertook to provide for the transfer of funds to a jointly administered trust, they created a public trust under Section 302. That entity is a creature of federal law in the same way that a collective bargaining agreement is a creature of federal law under Section 301. Thus, that entity's content must comply with Section 302 and the federal common law developed thereunder.

The principle that the content of a Section 302 trust must comply with federal law is not contrary to this Court's decision in *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157 (1971). There the union and the N.L.R.B. had charged the employer with an unfair labor practice as a result of the employer's refusal to bargain over an adjustment the employer had made in medical coverage for retirees. This Court ruled that those retirees' benefits were not a mandatory subject of collective bargaining and therefore the employer was not bound to bargain concerning health benefits for existing retirees. The issue in that case was whether retirement rights were subject to compulsory bargaining, not whether benefit rights were enforceable. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 157, 177, n. 17 (1971). National Labor Relations Act §8(b)(3), 29 U.S.C. §158(b)(3).

According to the Trustees' analysis of *Allied Chemical & Alkali Workers*, any unlawful provision of a collectively bargained agreement would be immune from judicial review so long as the provision was only a permissive subject of collective bargaining, and not a mandatory subject. This Court did not hold that illegal provisions of a collectively bargained agreement relating to nonmandatory subjects of collective bargaining would be immune from review. *Allied Chemical & Alkali Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 157 (1971).

Furthermore, the facts of the case at hand show that the collective bargainers, realizing that a collective bargaining agreement "is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate," *United Steel Workers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), had also freely undertaken to expressly provide in the terms of their agreement that the trustees were directed to make changes in the plans and trusts to comply with all applicable court decisions or rulings. (Article XX, P.A. 106a); *Robinson* v. *UMWA Health & Retirement Funds*, 449 F.Supp. 941, 944 (D.D.C. 1978), (P.A. 30a). This express provision of the collective bargainers' agreement clearly demonstrates that the collective bargainers intended that the trust provision would be conformed to comply with a judicial decision such as the decision of the Court of Appeals. This express intent of the bargainers that the trust be conformed is binding on the trustees. *Carbon Fuel Co.* v. *United Mine Workers*, 444 U.S. 895 (1979); *Robinson* v. *UMWA Health & Retirement Funds*, 640 F.2d 416 (D.C. Cir. 1981).

In sum, in the present case neither collectively bargaining party will be forced to bargain to impasse. If there is a conflict between Section 302 of the L.M.R.A. and Section 8(b)(3) of the N.L.R.A., such conflict is not presented in this case.

IV.

The Court of Appeals decision is consistent with applicable trust doctrines.

The *amicus curiae* AFL-CIO argues that the Circuit Court's decision is contrary to the common law of trusts. According to the AFL-CIO, Section 302 was enacted in accordance with the traditional common law distinctions between settlors and trustees and the "virtually unlimited discretion in the settlor to determine trust beneficiaries." (AFL-CIO amicus brief, page 6-7, 10-11).

Although the AFL-CIO's dissertation fairly recounts the basic law generally concerning private trusts, it misapplies that law to the facts in issue, and it clearly avoids the essential and significant differences between ordinary private trusts and Section 302 employee benefit trusts.

The Petitioner 1950 Benefit Trust is not a private trust, but instead a special form of charitable trust, *Van Horn* v. *Lewis*, 79 F.Supp. 541, 544-45 (D.D.C. 1948); *Hobbs* v. *Lewis*, 159 F.Supp. 282, 286 (D.D.C. 1958); *Kennet* v. *United Mine Workers*, 183 F.Supp. 315, 317 (D.D.C. 1960). Trusts of the kind here involved, established under a specific exception to the Taft-Hartley Act, are hybrids which do not fit the categories of ordinary trusts. *Roark* v. *Lewis*, 401 F.2d 425 (D.C. Cir. 1968), citing Restatement (Second) of Trusts, §375, comment (1959). Unlike the ordinary trust, where a private settlor beneficently disposes of his private estate by funding a trust, Section 302 trusts are funded by the labor of intended beneficiaries such as

Floyd Robinson and Paul Hager, who work long years in contributory employment. Payments to Section 302 trusts are not made out of the employer's munificence, but out of the employer's obligation, under federal labor law, to the signatory union and employees. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459, 465-66 (1960), *Roark* v. *Lewis*, 401 F.2d 425, 427 (D.C. Cir. 1968). The AFL-CIO fails to recognize that Settlors do not have unlimited discretion in determining the class of beneficiaries. They also fail to admit that the applicability of the cy pres doctrine is determined by the type of trust involved. The AFL-CIO's reference to this Court's decisions in *Evans* v. *Abney*, 396 U.S. 435 (1970), and in *Evans* v. *Newton*, 382 U.S. 296 (1966), is illustrative.

This Court's holding in *Evans* v. *Newton*, 382 U.S. 296 (1966) totally disproves the AFL-CIO's argument that under common law settlors could exercise a "virtually unlimited discretion." (AFL-CIO amicus brief, page 6). The settlor in *Evans* was unsuccessful in his effort to restrict the park's use to whites because such a class of beneficiaries is impermissible in a public trust. In the present case, the settlors of the 1950 Benefit Trust were also unsuccessful in their effort to restrict the use of the trust by excluding Respondents, because such an exclusion is impermissible in that public trust.[9] Section 302

[9]Additionally, it is axiomatic that even under common law a trust provision which is contrary to law or public policy, as is the arbitrary and capricious benefit provision in issue, would not be valid. I *Scott on Trusts* §4 (3d ed. 1967).

(c)(5) of L.M.R.A., 29 U.S.C. §186(c)(5). *Roark* v. *Lewis*, 401 F.2d 425 (D.C. Cir. 1968).

Likewise, this Court's holding in *Evans* v. *Abney*, 396 U.S. 435 (1970) is misunderstood by the AFL-CIO. The AFL-CIO correctly states that in *Evans* v. *Abney* this Court applied

> "the well accepted rule that in applying cy pres, if the testator's sole purpose cannot be effected and the testator would presumably have preferred the whole trust to fail rather than to see the removal of a restriction that had become illegal, the trust could not be modified but would fail."

Amicus Brief of AFL-CIO at Page 10, citing *Evans* v. *Abney*, 396 U.S. 435, 446-447 (1970).

However, the AFL-CIO misapplies that concept to the facts of this case. This Court's decision in *Evans* v. *Abney* was based entirely on a particular state trust law of Georgia. It was not based on federal law. *Evans* v. *Abney*, 396 U.S. 435, 439-40. The law of Georgia provided that if a trust had an unlawful purpose and could not be reformed in such a way as to be lawful and in conformance with the testator's wishes the trust must fail, while under federal law employee benefit trusts are irrevocable. Also, no one has had the temerity to suggest that the settlors of the 1950 Benefit Trust would prefer the whole trust to fail rather than see health coverage afforded to the widows of men such as Floyd Robinson and Paul Hager. Unlike the settlor in *Evans* v. *Abney*, who restricted the public park to whites because he strongly wanted blacks excluded, the settlors in the

case at hand had not *specifically* considered the Respondent-widows' class. Indeed, the industry's negotiator testified that they did not consider the fact, in light of their priority to reward contributory service after age fifty-five, that at least some of the deceased husbands of the Respondent class of widows in fact did keep working after fifty-five and in fact did keep working with contributory employers (J.A. p. 119). Additionally, in the case at hand the settlors expressly authorized and directed that the Trust was to be conformed to comply with applicable court decisions. (Article XX, P.A. 106a). When the settlors expressly provided that authorization, they were no doubt aware of the numerous court decisions, such as *Roark* v. *Boyle*, 439 F.2d 497 (D.C. Cir. 1970), which had reformed eligibility provisions.

The settlors expression that the Trust be conformed to comply with applicable court decisions is totally in accord with the requirements of ERISA Section 404, 29 U.S.C. §1104 (1974). The legislative history of ERISA Section 404 indicates that Congress clearly envisioned situations in which trustees themselves would be required to act contrary to the stated terms of the trust in order to properly carry out duties owed participants and beneficiaries. As the legislative history shows, ERISA's fiduciary:

> principles place a two-fold duty on every fiduciary: to act in relationship to the plan's

> fund as a prudent man in a similar situation and under like conditions would act, and to act consistently with the principles of administering the trust for the exclusive purposes previously enumerated, and in accordance with the documents and instruments governing the fund *unless they are inconsistent with the fiduciary principles of the section.* (Emphasis added).

H.R. Rep. No. 93-533, 93d Cong. 2d Sess. (1974), 1974 U.S. Code Cong. Admin. News, 4650-4651.

V.

Judicial review of collective bargained employee trust provisions under Section 302 is consistent with ERISA.

The argument of *amicus* AFL-CIO that the Court of Appeals' decision is somehow contrary to the approach Congress took in enacting ERISA is erroneous. ERISA was enacted at a time when the collective bargaining of Section 302 employee trusts had become rather commonplace. Yet rather than in any way diluting the grounds for judicial intervention, Congress instead codified and strengthened the remedial and fiduciary aspects which have developed from Section 302 and specifically left the sole and exclusive benefit provisions of Section 302(c)(5) in effect. 29 U.S.C. §§1104, 1031, 1144(d). *N.L.R.B.* v. *Amax Coal Co.*, _____ U.S. _____, 101 S.Ct. 2789 (1981). Accordingly, Section 302 remains applicable, and cases involving both Section 302 and ERISA claims may still be

decided on Section 302 grounds. For instance, *Music* v. *Western Conference of Teamsters*, 660 F.2d 400 (9th Cir. 1981), involved a challenge to pension plan requirements. The plaintiff in that case claimed both Section 302 and ERISA violations. The court ruled that the pension regulation in issue was arbitrary and capricious under Section 302 and ruled that the plaintiff was entitled to benefits. The *Music* court ruled that "[b]ecause we find that the eligibility requirement here is arbitrary and capricious under §302(c)(5), we need not address Music's contentions involving the Employee Retirement Income Security Act, (ERISA), 29 U.S.C. 1001, et seq. (1974)." *Music* v. *Western Conference of Teamsters*, 660 F.2d 400, 405, n. 13 (9th Cir. 1981).

In enacting ERISA, Congress had the opportunity, in light of both the increasing collective bargaining of eligibility provisions and the number of judicial decisions which held that Section 302 imposes substantive requirements, to abolish or restructure the then well established principles regarding the application of the Section 302(c)(5) "sole and exclusive benefit" test. Instead, Congress affirmed and strengthened those principles, making it clear that retirement benefits cannot be left solely to the manipulations of the collective bargainers. *N.L.R.B.* v. *Amax Coal Co.* ____ U.S. _____, 101 S.Ct. 2789 (1981). 29 U.S.C. §1104, 1031, 1144(d) (1974).

CONCLUSION

For the reasons above stated, the decision of the United States Court of Appeals for the District of Columbia Circuit should be affirmed.

Respectfully submitted,

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